2005

State of Utah v. Christopher Sean Kearns : Brief of Appellant

Utah Court of Appeals

Gregory Saunders; Attorney for Defendant/Appellant.
Ryan J. Shaum; Deputy Washington County Attorney; Attorney for Plaintiff/Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. CHRISTOPHER SEAN KEARNS, Defendant/Appellant.	)))))))))	APPELLANT'S OPENING BRIEF Case No. 20050940-CA

APPEAL FROM THE JUDGMENT AND CONVICTION FOR INTOXICATION, IN VIOLATION OF UTAH CODE ANNOTATED § 76-9-701 (AS AMENDED 3-21-97), A CLASS C MISDEMEANOR, IN THE FIFTH JUDICIAL DISTRICT COURT, ST. GEORGE DEPARTMENT, WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE JAMES L. SHUMATE, JUDGE PRESIDING. THE APPEAL IS TAKEN FROM PART OF THE JUDGMENT WHEREIN THE HONORABLE PAT B. BRIAN, ACTING AS ASSIGNED JUDGE, DENIED DEFENDANT'S REQUEST FOR DISCOVERY WITHOUT THE PAYMENT OF A FLAT FEE OF FIVE DOLLARS ($5.00) TO THE WASHINGTON COUNTY ATTORNEY.

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ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

LIST OF PARTIES

The following is a complete list of the parties in the proceedings before the Fifth Judicial District Court, St. George, Washington County, Utah:

JUDGE

The Honorable James L. Shumate Judge Presiding;

The Honorable Pat B. Brian Assigned Judge for the discovery documents five-dollar ($5.00) flat fee issue on appeal.

PARTIES

State of Utah, Plaintiff/Appellee represented by Ryan J. Shaum, Deputy Washington County Attorney;

Christopher Sean Kearns, Defendant/Appellant, represented by Gregory Saunders, Attorney at Law.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	**APPELLANT'S**
Plaintiff/Appellee,	)	**OPENING**
	)	**BRIEF**
vs.	)	
	)	
CHRISTOPHER SEAN KEARNS	)	**Case No. 20050940-CA**
	)	
Defendant/Appellant.	)	

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) which gives this Court authority over appeals of criminal cases involving class C misdemeanors. The Fifth District Court entered its final order on September 12, 2005, therein convicting the above-named Appellant of one count: Intoxication, a class C Misdemeanor, in violation of UTAH CODE ANN. § 76-9-701 (as amend. 3-21-97). NOTE: This is a case of first impression.

STATEMENT OF THE ISSUE

Did the District Court Judge court err in denying Appellant's request for copies of the discoverable documents, free of charge, without the payment of the five-dollar ($5.00) flat fee demanded by the Washington County Attorney? (Note: this is a case of first impression).

STANDARD OF REVIEW

A trial court is generally allowed broad discretion in granting or denying discovery, however, the proper interpretation of a rule or procedure is a question of law and the trial court's decision is reviewed for correctness. State v. Spry, 2001 UT App 75, ¶ 8, 21 P.3d 675 (quoting State v. Knill, 656 P.2d 1026, 1027 (Utah 1982); Ostler v. Buhler, 1999 UT 99, ¶ 5, 989 P.2d 1073; State v. Bybee, 2000 UT 43, ¶ 10, 1 P.3d 1087).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

UNITES STATES CONSITUTION:
Article 1 § 9, Amendment IV, Amendment V, Amendment VI, Amendment XIV § 1.

CONSTITUTION OF UTAH
Article 1 § 1, Article 1 § 3, Article 1 § 12, Article 1 § 14, Article 1 § 27, Article V, §1, Article VIII, §3

UTAH CODE ANN.
§ 17-53-211, § 77-1-6, § 77-32a-1 § 78-2a-3(2)(e)

UTAH RULES OF CRIMINAL PROCEDURE
Rule 16

STATEMENT OF THE CASE

A. Nature of the Case

An Information filed in the Fifth District Court, St. George on November 9, 2004, charged Christopher Sean Kearns, Appellant, with Kidnapping (Domestic Violence), a second degree felony; Assault (Domestic Violence), a class B misdemeanor; Intoxication, a class C misdemeanor (R. 1-2).

B. Course of Proceedings

Appellant sought to have copies of the discoverable documentation in the Washington County Attorney's files provided in order to defend against the charges (R. 11-12). The Washington County Attorney demanded the payment of a flat fee of five-dollars ($5.00) before providing copies of any documents other than the Information (R. 14-16). Appellant objected to the fee (R. 26-28). After Appellant's motions (R. 73-80a) all of the Fifth District Court Judges we recused from hearing the five-dollar discovery documentation fee issue (R. 113; R. 119). The decision on the issue of the five-dollar fee for copies of discoverable documentation was assigned to Honorable Pat B. Brian (R. 120; R. 132).

C. Disposition in Trial Court

On June 2, 2005 the Honorable Pat B. Brian denied Appellant's request for free copies of discovery documents (other than the Information which had been provided) without the payment of a fee (R. 122-126).

Appellant filed a motion for a stay pending a petition for permission to appeal an interlocutory order (R. 128-131) and filed the petition with the Court of Appeals, which was denied by Honorable Judge Gregory K. Orme, without prejudice, allowing Appellant to pay the fee 'under protest' and appeal the trial court's ruling on the discovery document fee after a final adjudication (R. 144).

On September 2, 2005 the trial court, on the state's motion, dismissed the Kidnapping and Assault charges and accepted the Appellant's conditional No Contest plea to the charge of Intoxication, a class C misdemeanor (R. 160-161). The final judgment and order was filed on September 12, 2005 (R. 162-165).

A Notice of Appeal was filed on October 3, 2005 appealing the order of the trial court (R.168-169).

D. Statement of the Facts

1. Appellant, charged by Information in a criminal case, forced to defend himself against those charges while still presumed innocent, requested copies of specific discoverable documents held by the Washington County Attorney (R. 11-13, see numbers 1,2,3,6,7,8.). Defendant agreed to pay all reasonable costs of reproduction of any audiotapes, videotapes or pictures (R. 12, see numbers 4, 5).

2. The Washington County Attorney filed a response to that motion (R. 14-16) which did not make specific replies to all of defendant's specific discovery requests. That response, though listing documentation it possessed in the state's file (R. 14), refused to

provide copies of the requested documentation without the pre-payment of a five-dollar ($5.00) flat fee (R. 15 ¶ **NOTICE IS HEARBY GIVEN**).

3. The were only two alternatives offered by the Washington County Attorney as to appellant obtaining copies of the discoverable documents. These were 1) attend their office to inspect the documents and pay the five-dollar ($5.00) flat fee for any photocopying, or 2) send a check to them for the five-dollar flat fee and they would mail copies of the documents (R. 15 Id.).

4. Appellant filed a reply to the State's response objecting to the demand for the five-dollar ($5.00) flat fee for copies of discoverable documents and in that reply requested a hearing on the matter (R. 26-28).

5. Subsequent hearings held on the issue including oral arguments and briefs (R. 47-72; R 81-109). These eventually resulted in Appellant making written and oral motions to recuse all the Fifth District Judges from deciding the five-dollar ($5.00) flat fee issue (R. 113; R. 119; R. 120; R. 132) because a substantive part of the Washington County Attorney's brief was based upon an AFFIDAVIT by the then Washington County Attorney, Eric A. Ludlow, who was now a sitting Fifth District Judge (R. 60-62).

6. The Assigned Judge, Pat B. Brian issued a ruling on the fee issue on June 2, 2005, which denied Appellant's request, with the exceptions of receiving free a copy of the Information (which had already been provided by the Washington County Attorney)

and a copy of the probable cause statement, which *despite the ruling*, the County Attorney would not provide without the fee (R. 105-108).

7. On July 12, 2005 Appellant paid the demanded five-dollar ($5.00) flat fee by check 'under protest' (See Addendum D) and on July 15, 2005 received a new discovery response from the County Attorney (R. 151-153), which included all of the documents listed in the response that had not been previously provided, including: 1) Probable Cause Statement (two pages); 2) Officer's Report (four pages); 3) Report Routing Slip (supplement)(one page); 4) Investigation Narrative (two pages); 5) Fax from Purgatory (one page); 6) Defendant's Criminal History (sic)[and driver license check](fifteen pages)(R. 152 ¶ 6).

8. On September 2, 2005 Appellant entered a conditional plea of no contest to the single Count of Intoxication, a class C misdemeanor (all other charges were dismissed by motion of the County Attorney), while specifically reserving the right to appeal the trial judge's decision on the five-dollar flat fee issue for copies of discoverable documents (R. 162-165).

9. On September 12, 2005 the District Court entered a final judgment reflecting the no contest plea to the single count of Intoxication, a class C misdemeanor and ordered a one hundred ($100.00) dollar fine, ninety (90) days bench probation, five-days jail with credit for five days served, and the JUDGMENT specifically held that the "plea is conditional upon defendant's right to appeal the $5.00 discovery fee issue" (R. 163 ¶ 3).

SUMMARY OF THE ARGUMENTS

Appellant argues that the assigned District Court Judge erred in finding that Appellant, a defendant in a criminal case forced to defend himself against charges, which included a second degree felony, and at that stage of the criminal process was presumed innocent, did not have constitutional, statutory and rights under the rules to receive free copies of specific discoverable documents that were in the Washington County Attorney's files (and some were also in the Court's file).

Appellant argues in the first alternative that if there were some documents that were in the Washington County Attorney's file that he could be compelled to pay for, there were also documents that must be provided to him without cost.

Appellant argues in the second alternative that if he could be compelled to pay for copies of any of the documents that were held in the Washington County Attorney's file that the only alternative factually offered involved the indiscriminate payment of a five-dollar ($5.00) flat fee regardless of the number of documents (no per-page charge option), thus, de facto forcing him to pay costs either for other defendants or for other non-defendant operating costs of the County Attorney, and is an unfair charge.

ARGUMENT

1. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION TO RECEIVE FREE COPIES OF SPECIFICALLY REQUESTED DOCUMENTS, WHICH WERE IN THE COUNTY ATTORNEY'S FILE RESULTING IN A FORCED PAYMENT OF A FIVE-DOLLAR ($5.00) FLAT FEE.

A) Constitutional rights prohibit a fee for any discoverable documents in a criminal case.

The Constitution of the United States mandates that a defendant shall not "be deprived of life, liberty, or *property*, without the due process of law." U.S. Const. amend. V (emphasis added) and "[i]n all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation..." Id. amend VI, and

> [a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law* which shall abridge the privileges or immunities of citizens of the United States; nor shall *any State deprive any person of* life, liberty, or *property*, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Id. amend. XIV § 1. (emphasis added).

Further "...no *warrants shall issue*, but upon probable cause, supported by oath, and, affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Id. amend IV (emphasis added), and

> [a] person charged in *any State* with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled be delivered up, to be removed to the State having Jurisdiction of the Crime. Id. art. IV, § 2. cl. 2 (emphasis added).

The Constitution of Utah states "[a]ll men have the inherent and inalienable right to enjoy and defend their lives and liberties, to acquire, possess and protect *property*." Id. art.1 § 1 (emphasis added), and "[t]he State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land. Id. § 3,

and " ... to demand the nature and cause of the accusation against him, to have a *copy* thereof," § 12 ... "In no instance shall any accused person, *before final judgment*, be compelled *to advance money* or fees to secure the rights herein guaranteed. Id. (emphasis added). "Nothing in this constitution shall preclude the use of reliable hearsay evidence...*if appropriate discovery is allowed* as defined by statute or rule. Id. In addition, "...no warrant *shall issue* but upon *probable cause supported by oath or affirmation*, particularly describing the place to be searched, and the person or thing to be seized." Id. § 14 (emphasis added). "Frequent recurrence to *fundamental* principles is essential to the *security of individual rights* and the perpetuity of free government. Id. § 27 (emphasis added).

The United States Constitution specifically denies the States certain powers. "No Bill of Attainder or ex post facto law shall be passed. Id. art. 1. § 9 cl. 3. Black's Law Dictionary under "attainder" states "[i]f an act inflicts a milder degree of punishment than death, it is called a 'bill of pains and penalties', but both are included in the prohibition in the Constitution (art 1, § 9), citing Losier v Sherman, 157 Kan. 153, 138 P.2d 272, 273 (1943); State v. Graves, 182 S.W.2d 46, 54. BLACK'S LAW DICTIONARY (6th ed. 1990).

The Constitution of Utah outlines the three branches of government authority and states that there is "the Legislative, Executive, and Judicial; and no person charged with the exercise of power properly belonging to one of these departments, shall exercise any

functions appertaining to either of the others, except in the cases herein expressly directed or permitted." Id. art. V. § 1 and "[t]he Supreme Court shall have original jurisdiction to issue all *extraordinary writs* and .... power to issue all writs *and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.* Id. art.VIII. § 3 (emphasis added).

In the case at hand, and the document discovery five-dollar flat fee issue in general "[THE FLAT FEE]," all of the foregoing rights apply independently and, as to the *intent* of their meaning, apply as read together. This is a case of *first impression* that has not been decided by the Supreme Court of Utah, nor the Supreme Court of the United States, and as such there is no *direct* case authority to cite [1].

Defendant's believes that the intention of all of the foregoing constitutional privileges, in a criminal case, which has very different results with respect to deprivation of liberty and property rights than a civil case, is to render it 'fundamentally' wrong to put defendant, who is presumed to be innocent before the court, in a position where he is 1) forced by an INFORMATION to fight to defend his liberty (the Information included a second degree felony subject to a maximum indeterminate sentence of from one to fifteen years in prison), and at the same time 2) be forced to choose between the three alternatives suggested by the State that he a) pay THE FLAT FEE for any photocopying while inspecting the documents at the County Attorney's office, (i.e.) give up property (it

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1 Ruling on Defendant's Motion for Discovery; comments no *case law* to support defendant's position. R. 126. ¶2.

has not been argued that the $5.00 request does not represent defendant's property), or b) send a check to the County Attorney for THE FLAT FEE to have the copies of the documents mailed to him, (R. 15 ¶ **NOTICE IS HEARBY GIVEN**),[2] or implicitly c) defend his liberty without the benefit of he and his attorney having copies of the documents that the state has in their files and intends to use against him, for their private review and discussion at his attorney's office[3] (in addition, the state *and the Court* had in their possession the probable cause warrantless arrest statement (two pages) and the Court has already used that against Appellant to make bail decisions and the setting of a preliminary hearing date, without defendant having that same knowledge).

Appellant believes that the THE FLAT FEE acts as a 'bill of pains and penalties' that is constitutionally prohibited. U.S. Const.(art 1, § 9), supra. Appellant further believes that the Constitution of Utah affords the Judicial branch of the government the jurisdiction to decide the appropriateness of THE FLAT FEE for a criminal defendant brought before the Court and to make all "orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause." Id. art.VIII. § 3, supra. The Court's jurisdiction is not bound by either what the past Washington County Attorney, Eric Ludlow (a member of the Executive branch at the time the fee

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2 The County Attorney in its memorandum to the District Court suggests the alternative of a .25 cent per page fee, which was in fact not offered as an alternative (R. 15 ¶ 1; 49 ¶ 3; 50 ¶ 2; Judge's Ruling R. 125 ¶ 3.

3 Counsel has attended the County Attorney's office in the past to review documents, not provided, and the Deputy County Attorney remains in the room,

practice was instituted (now Honorable Judge Eric A. Ludlow, Fifth District Court Judge) thought was fair (R. 60-62). His affidavit is specific about the only choice being a FLAT FEE of five dollars (R. 61, ¶ 5, ¶ 6, ¶ 7)(no per-page option). Further, the Court's jurisdiction is not constrained by what the Washington County Commissioners (members of the Legislative branch) think is fair for charges and fees in civil maters (R. 63-72).[4] (Even saying this the Ordinance per-page, fee which Appellants contends is wrong, in any event was never offered as an option as previously stated and as is evident by the District Court record) (R. 15 ¶ **NOTICE IS HEARBY GIVEN**).

The State thus far has not, at any point, dealt directly with the Constitutional arguments defendant has made to the District Court at oral arguments and in his memorandum. The State has centered their arguments on a Utah statute (R.50 ¶ 4), a single word in the Utah Rules of Criminal Procedure Rule 16, "disclose" (R. 53 ¶ 1), an Affidavit by former County Attorney Eric Ludlow (R. 60-62) and a County Ordinance (R. 63-72). Additionally, civil cases cited by the State in their memorandum are distinguished from the Constitutional rights afforded criminal defendants as the former are cases that deal with plaintiffs who are *voluntarily* using state resources and thus were charged fees for copies of documents (R. 51 ¶ 2, ¶ 4).

The foregoing citations to the Constitutions make it clear that before a final

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to safe guard their file, and there is no opportunity for a private review or discussion between defense counsel and defendant, while reviewing the reports.
4 Ordinance 2003-838-O, dated 11-03-03 does not account for an indiscriminate flat fee of $5.00 (R. 64 ¶ c.)

judgment a criminal defendant cannot be charged for copies of the Information, the Probable Cause Statement, warrants (hold orders) or other documents, as "in no instance shall any accused person, before final judgment, be compelled to advance money to secure the rights herein guaranteed." U.T. CONST, art.1 ¶ 12, supra. Although though this is a case of first impression as to the exact due process issue, the Utah Supreme Court has repeatedly held

> that "fundamental fairness," the touchstone of due process, precludes, without limitation, a prosecutor from seeking an unfair advantage over a defendant through forum shopping by harassing a defendant through repeated filings of groundless and improvident charges, or *from withholding evidence. Overreaching by the State, in any of its forms*, is the chief evil we sought to prevent in Brickey. To the extent that these overzealous practices may infringe on a defendant's right to due process...*the loadstar of* Brickey, *then, is fundamental fairness*. State v. Morgan, 2001 UT 87, ¶ 15; 34 P.3d 767, 771 (2001).

The Morgan court, unlike the Brickey court found no abusive practice but was concerned with the due process issues of repeated Information filings. The court made a thorough case review of the differences in prior cases. In State v. Redd, 2001 UT 113, ¶ 13, a few months later, the Supreme Court again reiterates the keystone of due process being fundamental fairness but excused the prosecutors actions in that case. Then more recently the Utah Court of Appeals found that "the state did not innocently miscalculate quantum of evidence needed." State v. Rogers, 2005 UT App 379. Although the foregoing issues are refiling of Informations and the continuances of preliminary

hearings, the courts viewed each case with an eye toward the preservation of fundamental fairness.

In the case at hand, the act of withholding copies of discoverable documents, including the probable cause statement, a fax regarding a hold that is kept Appellant in jail, and a copy of his criminal record, without a forced payment of a fee for the documents is simply unfair and inimical to any sense of justice. The Fifth District Court had already used documents in the Court's possession without those documents being provided by either the Court or the County Attorney to defendant (the warrantless arrest probable cause statement and the notice of a Board of Pardons probation hold/ Adult Probation and Parole hold from Oregon). On November 9, 2005, Honorable Judge G. Rand Beacham, at defendant's video arraignment, set bail at twelve thousand dollars cash or bond based upon an *Information* and *a Probable Cause Statement*, the latter having not been provided to defendant (R. 6, 7, 8 and R. Bail undertaking 11-12-2004 not found). The Constitution of Utah, art. 1 §12 and §13 states clearly the word "*copy*" with respect to the need for the Information and the probable cause warrantless arrest statement. Defendant had not been provided the Probable Cause Statement or the one page fax regarding an 'Adult Probation and Parole hold, no Board of Pardons warrant,' for lack of paying THE FLAT FEE.

On November 10, 2004, at a Status Hearing, Honorable Judge Shumate confirmed Judge Beacham's bail order based on the Probable Cause Statement in the Court's

possession (R.3-4) and the prosecutor referring to the fax about the Adult Probation and Parole hold, not in defendant's possession (R. 5-6)(alleged parole violation based on the Utah charges). On November 12, 2005, Judge Shumate heard from current defense counsel as to why the Judge had authority to bail defendant on the Oregon hold (Utah statutes allow it in cases where the other state's violation is based on the Utah charge)(R. 8). At that point neither Defendant, nor his counsel, had received any copies of documentation about the hold or the Oregon Governor's Warrant because of THE FLAT FEE (R. Id.).[5]

Judge Brian stated in his Ruling dated June 2, 2005 that "[h]owever he [defendant] did not receive a free copy of the Probable Cause statement. Once a copy of the Probable Cause statement has been given to the Defendant the State's Constitutional obligations have been met." (R. 125 ¶ 1). Despite the Ruling the State did not provide a copy of the Probable Cause statement and refused to do so until THE FLAT FEE was paid (see footnote 5).

As previously stated, this is a case of first impression and there is no case law, anywhere, on the point of a criminal defendant being charged for copies of discovery documents, before a final adjudication. The Supreme Court of Delaware, In the Matter of

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5 The state at one point argued that "in many cases" defendants get served documents at initial appearances before counsel is hired (R. 52 ¶ 3), but does not argue that this defendant was 'in fact' served any documents other than the Information. The actual regular practice of this County Attorney is to only provide the Information at Initial Appearances. Defendant and counsel received only the Information.

the Petition of the State of Delaware for a Writ of Mandamus, 708 A.2d 983 (1998), "held that, as a matter of first impression, Family Court was not authorized to award attorney fees and costs." Id. 983. In that case a juvenile delinquent prevailed on his motion to compel discovery evidence that the court agreed the prosecutor should have produced under Rule 16 of that State's discovery rules and because of the violation the Juvenile court awarded the Juvenile attorney's fees and costs. Id. The Supreme Court, in reversing the Juvenile Court's decision stated "[w]hile we do not approve of the Deputy Attorney General's failure to promptly and voluntarily *produce* all properly discoverable Brady material, we find that the Family Court is not authorized to award attorney's fees and costs for a violation of the rules of discovery." Id. at 983-84. Delaware's discovery rule, like Utah's uses the word *disclose* but the Delaware Supreme Court by its ruling indicated that it meant, and used the word, *produce*. Id. 984.

The California Court of Appeals has decided that certain Civil Code procedure sections permitting attorney fees in connection with subpoena quashal did not apply to criminal cases. See M.B. v. Superior Court, 103 Cal.App.4th 1384, 127 Cal. Rptr.2d 454 (2002). The California Courts have also held that a "defendant could not be required to pay victim restitution for attorney fees victim incurred in opposing defendant's discovery subpoenas." See People v. Roberts, 2003 WL 393789 (Cal.App.3 Dist.)(Not Officially Published).

Brady v. Maryland, 373 U.S. 83 (1963) set the standard used for the last forty years

for the due process and the materiality of evidence that may not be withheld by the state in a criminal case. The Brady Court stated

> We now hold that the suppression of evidence favorable to an accused *upon request* violates due process where evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution...The United States wins its point whenever justice is done its citizens in the courts. A prosecution that withholds evidence *on demand of an accused* which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of the architect of a proceeding that does not comport with standards of justice. Id. at 87-88 (emphasis added).

In the case at hand, the withheld one-page fax from the jail indicating there was not a Board of Pardons warrant was favorable to Appellant and comments in the Probable Cause Statement that was withheld were eventually helpful to Appellant. Also, to have a member of the Executive or the Legislative branch of government effectively able to add an postscript to Brady that says "as long as you pay us for copies of the *material* information first because we *disclose* to you the existence of the confession of a confederate but will not give you a *copy* without payment of THE FLAT FEE forty years after Brady seems (with respect to the Court and the Washington County Attorney) surreal. Once this defendant and counsel were aware that there was a fax from the jail that stated there was no Board of Pardons warrant (R. 152 ¶ 6 dated 11-12-2004) the District Court Judge set the bail, which was promptly paid that day and Appellant was

released.

B. <u>Utah statutes specifically prohibit the state from charging a criminal defendant fees to secure his constitutional rights.</u>

The Utah Code of Criminal Procedure § 77-1-6 states that "(2) In addition: (b) No accused person shall, *before final judgment*, be compelled to advance money or fees to secure his rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received." Again, this argument raised in Appellant's oral arguments prior to the State's memorandum, and included in Appellant's memorandum in the District Court (R. 93 ¶ 3) was never directly responded to in the state's memorandum.

The State, without dealing with the constitutional provisions or the aforementioned Utah statute dealing with criminal defendant's rights, responds in its District Court memorandum (R. 50 ¶ 4) by citing the Utah Code ¶ 17-53-211 (as amend. 5-1-2000) that states "[t]he legislative body of each county shall adopt an ordinance establishing fees for services provided by each county officer, except: (1) fees for the recorder, sheriff, and the county constables, and (2) fees established by statute." The State then does not give any argument or authority on how this statute negates or supercedes the statute (or the Constitutional rights) dealing specifically with criminal defendants.

The Utah Code specifically states that "[i]n a criminal action the court may require a convicted defendant to pay costs." Utah Code Ann. ¶ 77-32a-1 (as amend. 5-6-2002), states "[c]osts cannot include expenses inherent in providing a constitutionally guaranteed trial or expenditures in connection with the maintenance and operation of government

agencies that must be made by the public irrespective of specific violations of law." Id. This statute prohibits the charging of fees for convicted defendants never mind, as in the case at hand, charging an accused person a fee.

In Utah, "[w]hen interpreting statutes, our primary goal is to evince the true intent of the Legislature." State v. Bradshaw, 2004 UT App 298 ¶ 9 (quotations omitted).

> In reading the language of an act, moreover, we seek to render all parts [of the statute] relevant and meaningful, and we therefore 'presume the legislature use[d] each term advisedly... according to its ordinary meaning. ... *However*, if the plain language of a statute is ambiguous, "unreasonably confused, [or] inoperable," we will "seek guidance" from other sources, including "legislative history and relevant policy considerations." (citations omitted) Finally, "[Utah statutory] provisions and all proceedings under them are to be *liberally construed* with a view *to effect the objects of the statutes and to promote justice*. Utah Code § 68-3-2 (2000). Id. at ¶9, ¶10 (emphasis added).

Viewing the cited Utah statutes undder the Bradshaw holding in dealing with criminal defendant's constitutional rights clearly prohibits the charging of a fee.

C. Utah Rules of Criminal Procedure, Rule 16 has been interpreted by Utah case law to also mean provide/present/produce/provide copies.

Utah Court's have compelled a defendant to *provide* copies, without fee (not just *disclose* the existence of copies) to the prosecution. See State v. McNearney, 2005 UT App 133; also see Notes to Rule 16. That Court held that the trial court's discovery order, requiring criminal defendant to *provide* the prosecution with a list of those witnesses defendant had a good faith intention to call at trial, did not violate defendant's right

against compulsory self-incrimination. Id. In that case, the Court held that the Rule 16 (c) requiring the defendant to *disclose* certain information to the prosecutor meant "it merely required a list of those witnesses." Id. at ¶ 13. In that case the Court uses the terms "disclose" and "provide" interchangeably.

Utah Courts have often used the terms "disclose" and "produce" interchangeably indicating the Court's intention that copies of documentation discovery should be produced when required to be disclosed. See State v. Knight, 734 P.2d 913 (Utah 1987).

> Therefore, we articulate two requirements that the prosecution must meet when it responds voluntarily to a request for discovery. First, the prosecution either must produce all of the responsive material requested or must identify explicitly those portions of the request with respect to which no responsive material will be provided. Second, when the prosecutor agrees to produce any of the material requested, it must continue to disclose such material on an ongoing basis to the defense. Id. at 916-17. (emphasis added)

It is the clear intent of Knight that the interchanging the words "produce" and "disclose" deals with the issue of objectionable requests, not on refusal to disclose/produce for lack of a payment of a fee.

Despite the foregoing, the state clings to the narrowest use/definition of 'disclose' possible as their main legal argument against the foregoing rights.[6] The thrust of the

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6 The 9/5/2000 Fifth District Court Ruling cited by the state in its District Court memorandum in State v. Little, #001500586 used the direct definition from Black's Law Dictionary, 6th ed. 1990, for the word "disclose" and did not analyze any other words such as disclo*sure or produce or provide* when the court reviewed Utah Rules of Criminal Procedure 16 "shall *disclose*." (R. 56 ¶ 3).

State's argument is that 'disclose' does not mean 'copy' or 'provide' or 'provide a copy' or 'produce'. Appellant avers that this is far from the required *liberal construing* of the statutes or the constitutions – it is in fact the opposite interpretation, the narrowest construing of their intent. See State v. Bradshaw, 2004 UT App. 298, supra.

The same edition of Black's Law Dictionary used in the Fifth District Court's Ruling lists **Disclosure** in securities law to mean "the *revealing* of certain financial and other information to investors considering buying securities in some venture." Id. Blacks 6th ed (1990). It is common knowledge that this is done by *providing* a thick document, free, called a prospectus to consumers before buying, to meet the *intent* of the law to protect the public in the *civil* arena. Also, that dictionary in **Disclosure Under Truth and Lending** "refers to the manner in which certain information...shall be *conveyed* to the consumer." Again *conveyed* would need to be viewed narrowly to limit the intent to not mean provide a document. Also see **Disclosure statement** "this is done by means of a *disclosure statement* which *accompanies* or is made a *part of the agreement.*" Id. Again, the Court would need to narrowly view *disclosure statement, accompany,* and *part of the agreement* as not meaning provide any document. An acceptance of this narrow definition of *disclose* would also mean accepting that the Court need not consider similar words such as disclo*sure, production, present, convey, accompanies* to effect its meaning. This issue carries even more gravity considering the case is dealing with an accused, not convicted at that time, criminal defendant. (Appellant in this case only entered a plea of

no contest to a class C misdemeanor as a means of getting this case before the Appellate Court in order to end a six-year practice of the Washington County Attorney charging the five-dollar flat fee). In essence the required narrow definitional use of "disclose" used by the state would eliminate the holding in State v. Bradshaw, 2004 UT App. 298, supra.

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The *need* to develop all relevant facts in the adversarial system is both *fundamental and comprehensive*. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full *disclosure* of all of the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the *production* of evidence needed by either the prosecution or by the defense." United States v. Nobles, 422 U.S. 225, 230-31(1975)(emphasis added).

Also see State v. Crespo, 2004 UT App. 181, ¶ 11 "the State must *present* exculpatory evidence" and finding that there was a discovery violation by the State but it did not "impair his defense" because Crespo had only "requested a copy of Ross's report" (which was provided) and not "a *copy* of Schneider's report" Id. at ¶ 20 (emphasis added). Also see State v. Pleigo, 974 P.2d 279, 282 (1999) quoting State v. Mickleson, 848 P.2d 677 (Utah App. 1992) "The prosecution should be deemed to have been obligated to *produce* the requested information about the criminal records of prosecution witnesses." Id. at 691-92 (emphasis added).

In the case at hand, criminal records were requested but none provided without THE FLAT FEE. Also see State v. Knight, 734 P.2d 913, 916 (UT 1987) the sections of Rule 16 "*mandate disclosure* upon request." Also see Mickelson, at 677 "the prosecutor's *disclosure* duty." And see State v. Spry, 2001 UT App 75 where the Court found for the State in a case where "the State filed a motion for discovery, requesting the names and testimony of defense witnesses, ***copies*** *of expert reports, exhibits and investigative reports that would be used at trial.*" Id. at ¶ 6. "Rule 16 essentially uses the same phraseology for both the prosecution and the defense, requiring *disclosures*..." Id. 679. Also for a practical application of withholding information see Kyles v. Whitley, 514 U.S. 419 (1995).

> Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result. This means, naturally, that a prosecutor anxious about tacking too close to the wind, will *disclose* a favorable piece of evidence. The prudent prosecutor will resolve questions in favor of *disclosure*. This is as it should be. Such *disclosure* will serve to justify trust in the prosecutor as "the representative...of a sovereignty...whose interest...in a criminal prosecution is not that it shall win a case, but that justice shall be done." And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. [Also] recognizing the general goal of establishing "*procedures* under which criminal defendants are 'acquitted or convicted on the basis of *all* the evidence

> which exposes the truth" The *prudence of the careful prosecutor should not therefore be discouraged*." Id. at 440-41 (emphasis added)

After all of the foregoing defendant feels it is a fair rhetorical question to ask "What system did the Court in the 9/5/2000 Fifth District Court RULING envisage for a "refund" of THE FLAT FEE for criminal defendants whose cases are dismissed?" Utah courts are aware of many dismissals. Does it intend that all those charged with offenses must sue for return of THE FLAT FEE?[7]

What is 'good for the goose is good for the gander.' Rule 16 (a)(5)(c) states "[e]xcept as otherwise provided or as privileged, the defense shall *disclose* to the prosecutor such information as required by statute relating to alibi or insanity." If the Fifth District Court's narrow interpretation of the word is to prevail, rather than the word's intent or by virtue of fundamental fairness and in the interest of justice, then the Court must find that defendant need only let the prosecutor know it had, for example a list of twenty-nine (29) alibi witnesses at a party who place defendant away from the scene of the crime, but that the names, addresses and telephone numbers on the three-page document are available only at defense counsel's office, and that the County Attorney must make an appointment at defense counsel's office, at a convenient time, to review the

---

7 Defense counsel is now in the process of filing a Notice of Claim against the Washington County Attorney for a FLAT FEE paid 'under protest' in a felony case with multiple counts that was subsequently fully dismissed and the County Attorney has, after being requested, not returned the five dollars ($5.00). State v. Cropper, Fifth District Court #051501584.

alibi witnesses document, or pay THE FLAT FEE of twenty-five dollars (*$25.00)*(higher amount since defense counsel is not a government employee with paid benefits and support staff) for a copy of the document. Would that comport with Bradshaw's, supra, intent?

Additionally, all of the foregoing evinces the notion that the intent of the constitution, statutes and fundamental fairness and justice, particularly as applied to the uniqueness of a person forced to defendant his liberty, is that a FEE is just wrong and inimical to the interest of justice.

2. IN THE FIRST ALTERNATIVE, IF THE APPELLANT CAN BE CHARGED A FEE FOR SOME DOCUMENTS, THERE ARE ALSO SOME FOR WHICH HE CLEARLY CANNOT BE CHARGED.

The discovery provided by the Washington County Attorney after the payment of THE FLAT FEE under protest included: a two-page warrantless arrest Probable Cause Statement; a four-page police officer's report; a one-page St. George Police Department Routing Slip; a two-page Investigator's Narrative; a one-page fax regarding an Adult Probation and Parole hold and a fifteen-page print-out criminal record check/driver license report on defendant (R. 14 ¶ 2).

A. Two-page warrantless arrest Probable Cause Statement.

Appellant has already in this brief demonstrated and that Honorable Judge Brian agreed in his Ruling that he has a right, without charge, for the Probable Cause Statement. The state did not, and does not, provide the Probable Cause Statement without THE

FLAT FEE. Appellant's Opening Brief, supra at p.12-13.

B. Fifteen-page printout of defendant's criminal record/driver license check.

Utah case law has already held that defendant has a right to copies of criminal record checks from the prosecutor. See State v. Pleigo, 974 P.2d 279, 282 (1999) quoting State v. Mickleson, 848 P.2d 677 (Utah App. 1992) "The prosecution should be deemed to have been obligated to *produce* the requested information about the criminal records of prosecution witnesses." Id. at 691-92 (emphasis added). In would be a contrary notion indeed that the rule requiring production of copies of State witnesses criminal records, but that same rule when directing disclosure of the defendant's record, would mean only disclose and not produce.

C. One-page fax regarding the Adult Probation and Parole hold.

It has been shown previously in this brief that the District Court was made aware on more than one occasion, about an Adult Probation and Parole hold, the court considered it and acted on that knowledge. Appellant's Opening Brief, supra at p.11-12. It would be contrary to any notion of due process fundamental fairness or interest of justice for a defendant to be accused, held on a AP&P hold, and on bail in part based upon a document that was in the Court's possession and the County Attorney's possession but not defendant's, unless, he paid THE FLAT FEE.

D. A total of seven (7) pages of police reports and a routing slip.

These documents contain, among, other things police recollections of both

witnesses and defendant's statements. If Rule 16, as shown in the Utah case previously cited, when it uses the word disclose also means provide copies, produce, provide, or present, then included in the police statements is information included in Rule 16(a)(1) and Rule 16(a)(5), and thus, copies of them should be produced without THE FLAT FEE.

3. THE FLAT FEE OF FIVE DOLLARS IS INDISCRIMIATE AND UNFAIR AND DE FACTO FORCES APPELLANT TO PAY FOR OTHER DEFENDANTS AND/OR GENERAL OPERATING EXPENSES OF THE WASHINGTON COUNTY ATTORNEY'S OFFICE

The only documents not in the District Court's possession/knowledge/use, besides appellant's criminal record/license check, were the seven (7) pages of police reports. The Flat Fee equates to .724 dollars (cents) per page, which is not a reasonable per-page fee since it exceeds the County's Ordinance fee of .25 cents per page (R. 64 at (c))(although as Appellant previously argues this statute does not trump other statutes or the constitutional rights of defendant's). In the state's memorandum to the District Court (R. 50 ¶ 2) and in Honorable Judge Brian's Ruling (R. 125 ¶3) both the Deputy County Attorney and the Judge argue that the per-page fee, offered, was reasonable. The District Court **RECORD** does not reflect that this choice was offered (R. 15 ¶ **NOTICE IS HEARBY GIVEN**; Appellant's Opening Brief, supra at p.12; and Appellant's Opening Brief, supra at footnote 2).

Even if this Court found against all Appellant's constitutional, statutory, rules of procedure and case law arguments, this Court should not consider that an alternative given to Appellant was a .25 cent per-page fee because it was not. The RECORD in this

case reflects that it was not (R. 15 ¶ 1). The state's memorandum to the District Court, as a substantive part of its memorandum, included the AFFIDAVIT of the then Washington County Attorney Eric A. Ludlow, wherein he discusses only the five-dollar flat fee, also indicates the alternative was not offered, nor was ever intended to be offered (R. 60 ¶ 5, 6, 7). Additionally, although the County Attorney added the alternative in its District Court memorandum it is factually incorrect and it is not the Washington County Attorney's current, past or general practice.[8]

CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the foregoing, Appellant respectfully requests this Court reverse the District Court's denial of his request for the discoverable documents in this case without the payment of a fee, which was paid, and Order that the five-dollar fee be returned.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests oral argument in the above matter due to the importance of this case as a case of first impression in a criminal case and the future, varied and unequal, ramifications a decision to allow any charges for copies of discoverable

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8 Although not included in this brief, as it would be improper under the rules of briefs and addendums, counsel invites this court to request of him copies of Washington County Attorney discovery responses, in other cases, when THE FLAT FEE is not paid, since 9-12-05 (Judgment in this case) and the date of filing this brief. Counsel also invites this court to request/offer the opportunity for counsel to provide several notarized affidavits by local long-standing defense counsel to this issue.

documents in a criminal case will have throughout the different County Attorney's offices in the state as the fees proliferate and increase.

RESPECTFULLY SUBMITTED this 3rd day of February, 2006.

GREGORY SAUNDERS, Attorney at Law
Attorney for Defendant/Appellant

By _____
GREGORY SAUNDERS

CERTIFICATE OF SERVICE

I hereby declare that I have mailed, postage prepaid, a true and correct copy of the foregoing Appellant's Opening Brief, this 3rd day of February, 2006, to:

Ryan J. Shaum
Deputy Washington County Attorney
278 North 200 East
St. George, Utah 84770

_____
GREGORY SAUNDERS

ADDENDUM

Addendum A

3 pages

GREGORY SAUNDERS, #8433
Attorney for Defendant
50 East 100 South, Suite 101
ST. George, Utah 84770
Telephone: (435) 986-9600

FIFTH JUDICIAL DISTRICT COURT, ST. GEORGE DEPARTMENT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. *CHRISTOPHER SEAN KEARNS,* Defendant.	)	**MOTION FOR DISCOVERY** (and reservation of right to a discovery hearing) *Case No. 041501473* Judge:

Christopher Sean Kearns by and through his attorney of record, Gregory Saunders, hereby moves this Court for orders for discovery production as follows:

1. For an order requiring the Washington County Attorney to provide a copy or summary of all statements taken from the defendant, whether recorded or not, that may be used against him;

2. For an order requiring the Washington County Attorney to provide a copy of un-redacted NCIC criminal record on defendant;

3. For an order requiring the Washington County Attorney to provide a copy of un-redacted NCIC criminal record checks on any state witness who will give testimony, including police, and the alleged victim including a check of her aka's: first names: Lynda and / or Raylene;

surnames Conley, and/or Welsh, and/or Costello, so that they may be used by the defendant for 'good cause' purpose of impeachment;

4. For an order requiring the Washington County Attorney to provide duplicate copies of all audiotapes, videotapes or pictures (defendant agrees to pay all reasonable costs for duplication);

5. For an order requiring the Washington County Attorney **to secure before it is erased in normal due course of 60 days**, and then provide a duplicate copy of the dispatch tape of all calls relating to i) the initial call to the police and ii) the dispatch calls to and from the officers, relating to this case;

6. For an order requiring the Washington County Attorney to provide an inventory list of all physical evidence and a name and telephone number of the evidence custodian so that defense counsel may arrange an inspection of said evidence;

7. For an order requiring the Washington County Attorney to a list of all persons by name, address and telephone number that were interviewed by police in this matter, whether they are to be called as a witness or not, so that defendant can conduct his interview with those same persons;

8. For an order requiring the Washington County Attorney to disclose to the defendant any and all evidence which is or may be material, favorable, exculpatory or mitigating to the defendant in the defense of the above-entitled case.

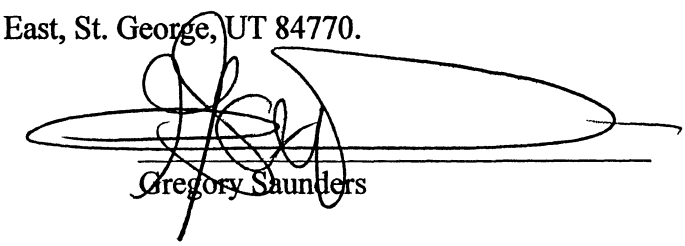
DATED this 12th day of November, 2004.

Attorney for Defendant

By
GREGORY SAUNDERS

CERTIFICATE OF SERVICE

I hereby declare that I hand delivered a true and correct copy of the foregoing Motion for Discovery, this 12th day of November, 2004, to the Washington County Attorney's Representative, at, 178 North 200 East, St. George, UT 84770.



Gregory Saunders

3 pgs

Brock R. Belnap #6179
Washington County Attorney
Ryan J. Shaum #7622
Deputy Washington County Attorney
178 North 200 East, St. George, Utah 84770
(435) 634-5723

FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, **vs.** CHRISTOPHER SEAN KEARNS, Defendant.	STATE'S RESPONSE TO DEFENDANT'S REQUEST FOR DISCOVERY Criminal No. 041501473 Judge

The State of Utah, by and through Ryan J. Shaum, Deputy Washington County Attorney, and pursuant to Rule 16 of the Utah Rules of Criminal Procedure, hereby responds to the defendant's Request for Discovery in the above-captioned case.

1. A copy of the Information executed by Ryan J. Shaum, dated November 09, 2004, is provided herewith.

2. The following is a list of all evidence in possession of the Washington County Attorney's Office for the above-captioned case:

Document/Item	**Date**	**Executed by**
Information	November 9, 2004	Ryan J. Shaum
Probable Cause Statement	November 6, 2004	T. Johnson, SGPD
Officers Report	November 6, 2004	S. Powell, SGPD
Report Routing Slip	November 6, 2004	S. Powell, SGPD
Defendant's Criminal History	November 8, 2004	

1.

NOTICE IS HEREBY GIVEN: Pursuant to Rule 16(e) of the Utah Rules of Criminal Procedure, you may inspect the items disclosed above at a reasonable time and place by making an appointment with the Washington County Attorney's Office during regular business hours. Facilities will be available for you to make photocopies of discovery materials at the time of your visit. The cost for photocopying discovery materials is $5.00. If you prefer to receive photocopies of discovery materials, photocopies of such materials that are amenable to photocopying will be sent to you upon receipt of $5.00 by the Washington County Attorney's Office. Any discovery materials in the possession of the Washington County Attorney's Office that do not lend themselves to photocopying may be examined during regular business hours.

3. Any relevant oral or written statements by the defendant or co-defendants, which are known to the prosecution, are contained in the materials disclosed in paragraph 1 and may be inspected or photocopied as provided herein.

4. Any criminal record of the defendant, if known to the prosecution, is contained in the materials disclosed in paragraph 1 and may be inspected or photocopied as provided herein.

5. A list of physical evidence seized, discovered or collected by investigating officers in relation to the above-captioned case is contained within police reports and other discovery materials disclosed in paragraph 1. Items of physical evidence, including audiotapes, videotapes, photographs, etc., if any, are available for inspection by defendant. Please contact the Washington County Attorney's Office to arrange such inspection.

6. The State of Utah may call any or all of the following witnesses for hearing and/or trial in the above-captioned case:

Name
T. Johnson, S. Powell, R. Farnsworth, St. George Police Department
Victim

Godmother of victim

7. The State of Utah is unaware of any information which tends to negate or mitigate the guilt of the defendant or which would reduce the degree of offense or degree of punishment other than any such information which may be contained in the materials listed in paragraph 1.

8. All responses contained herein are true and correct as of the date of preparation of this document. However, investigation and/or preparation for litigation are continuing. Therefore, defendant's Request for Discovery will be treated as continuing, and the State of Utah specifically reserves the right to amend and/or supplement its responses thereto.

9. The State of Utah hereby objects to all other requests contained in defendant's Request for Discovery as being beyond the scope of Rule 16 of the Utah Rules of Criminal Procedure.

11/15/04
DATE

RYAN J. SHAUM
Deputy Washington County Attorney

CERTIFICATE OF DELIVERY

I hereby certify that on 11-15-04, I mailed, postage pre-paid, a true and correct copy of the foregoing document with attachment to:

Mr. Gregory Saunders
Attorney at Law
50 East 100 South
St. George, UT 84770.

Christena Wood
SECRETARY

ADDENDUM C.
Copy

IN THE THIRD DISTRICT COURT,
SALT LAKE COUNT, STATE OF UTAH
West Valley Department

STATE OF UTAH,	:	**RULING ON DEFENDANT'S MOTION FOR DISCOVERY**
Plaintiff,	:	
vs.	:	Case No. 041501473
CHRISTOPHER SEAN KEARNS,	:	
Defendant.	:	Judge PAT B. BRIAN

This matter comes before the Court on transfer from the Fifth District Court for decision on Defendant's Motion for Discovery. No hearing was requested. Upon reviewing the parties filings, applicable law, constitutional and statutory, the Court renders the following Ruling.

FACTS

Defendant Chris Kearns was arrested on November 6, 2004. He was subsequently charged with three criminal charges: Count 1: Kidnapping, a second degree felony; Count 2: Assault, a class B misdemeanor; and Count 3: Intoxication, a class C misdemeanor.

On November 12, 2004, Gregory Saunders entered an Appearance of Counsel for the Defendant, and served a Motion for Discovery on State's counsel. The State responded on November 15, 2004, by sending defense counsel a copy of the Information along with a list of discoverable material in its possession, and a list of witnesses that may be called to testify. The State also gave notice that the discoverable materials "may be inspected or photocopied," or

Defendant had the option of paying $5.00 to have the Washington County Attorney's Office photocopy all discoverable documents and have the copies sent to defense counsel.

On November 19, 2004, Defendant objected to the State's Response to Defendants Motion for Discovery, and requested a hearing. The court heard oral arguments, December 12, 2004, regarding the Defendant's objection to being "compelled" to pay the $5.00 copying fee. The State filed "Memorandum in Opposition to Defendant's Motion to Require State to Provide Free Copies of Discoverable Materials," on February 4, 2005. The State contended that under Utah law, the State is only required to disclose the discoverable information to the Defendant, but is not required to provide free photocopies. On March 9, 2005 , the Defendant filed "Defendant's Memorandum in Support of Defendant's Request for Discovery Without a Five Dollar Flat Fee," opposing the $5.00 flat fee. The Defendant claims that the fee for copies violates his rights as set forth in the Utah Constitution, the Utah Code and the Utah Rules of Criminal Procedure.

On May 2, 2005, the matter of the fee charged by the Washington County Attorney's Office in criminal matters was transferred to the Third District Court for resolution.

ANALYSIS

The Utah Constitution provides that "[i]n criminal prosecutions the accused shall have the right to appear and defend in person or by counsel; to demand the nature and cause of the accusation against him and to have a copy thereof." Utah Const. art. 1 § 12. The Constitution further provides that "[i]n no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed." Utah Const. art 1 § 12. Utah Code Ann. § 77-1-6(2)(b) also provides, " [n]o accused person shall, before final

judgement, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah."

Rule 16 of the Utah Rules of Criminal Procedure provides, in pertinent part:

> (a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:
> (1) relevant written or recorded statements of the defendant or codefendant;
> (2) the criminal record of the defendant;
> (3) physical evidence seized from the defendant or codefendant;
> (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and
> (5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

UTAH R.CRIM. P. RULE 16(a)(1)-(5)

The State argues that the requirement to "disclose" does not require the State to provide free photocopies of discoverable material to the defendant. The Defendant argues that the State is required to provide free photocopies of discoverable material as part of the duty to "disclose." The word disclose, however, is not defined in Rule 16. In Black's Law Dictionary "disclose" is defined as "the act or process of making something known that was previously unknown; a revelation of facts." BLACK'S LAW DICTIONARY 477 (7th ed. 1999). By definition the term "disclose" in Rule 16 appears to require that information that is known by the Prosecution but not known by the Defendant be made known or revealed to the Defendant. This definition does not suggest that photocopies of the disclosed information be provided free of charge.

The Defendant argues that the Utah Constitution provides that the Defendant must receive *a copy* of the accusations against him under the Utah Constitution art. 1 § 12. He further argues that he cannot be forced to pay a fee to receive a copy of the accusation under article 1 §

12 and the Utah Code § 77-1-6(2)(b). The Utah Constitution does require that a photocopy of the Information and Probable Cause statement be provided to the Defendant free of charge at his arraignment. In this case, the Defendant received a *free* copy of the Information which outlined the accusations against him at his arraignment. However, he did not receive a free copy of the Probable Cause statement. Once a copy of the Probable Cause statement has been given to the Defendant, the State's constitutional obligations have been met.

Additionally, the Defendant argues that the Court should liberally construe the meaning of the word "disclose" found in Rule 16 of the Utah Rules of Criminal Procedure. Specifically, the Defendant asks that this Court construe the word "disclose" to include "provide free photocopies of all discoverable material." "Disclose" as defined in Black's Law Dictionary requires "a revelation of facts" but makes no mention of photocopies. The Prosecutor must reveal all facts known to him that are unknown by the Defendant but he is not required under Rule 16 to produce free photocopies of the discoverable materials.

The Defendant argues in the alternative to no fee, that a flat fee for copying of documents is inappropriate and "may cause Defendant to pay indirectly for costs of other criminal defendants." If the Defendant was only given the option of paying a flat fee, the Court would agree. However in this case, the Defendant was given the option to pay the flat five-dollar fee for photocopies of *all* discoverable documents or pay a twenty-five cent per-page fee for only those documents the Defendant wanted copied. The Defendant had the opportunity to pay the fee that best suited him. This option would not result in subsidizing the costs of other criminal defendants. Moreover, the Defendant had the opportunity to inspect the documents available for discovery and choose which, if any, of the documents he wished to have photocopied for the per-

page fee It is noted that the five-dollar fee in most cases will not cover the actual cost of the photocopying *all* of the discoverable materials Thus the State subsidizes the remaining balance

Additionally, the State may charge a reasonable fee for the photocopying of discoverable material under the Utah law, *see* Utah Code Ann § 17-53-211 The five-dollar fee was created by a county ordinance, *see* Washington County, Utah, Ordinance 2003-838-O (Nov 3, 2003), and is therefore presumed valid The Defendant has the duty to prove the five-dollar flat fee and alternative twenty-five cent per-page fee are unreasonably excessive and unconstitutional There is nothing before the Court showing that the five-dollar flat fee and the twenty-five cent per page fee are unreasonable Furthermore, the Defendant has provided no case law to support this position

CONCLUSION

The Court concludes that the State has an obligation to provide a free photocopy of the Information and Probable Cause statement under the Utah Constitution The State is not required to provide free photocopies of any other discoverable documents under Rule 16 or the State Constitution The Defendant's constitutional rights, therefore, have not been violated by the State's refusal to provide *free* photocopies of *all* discoverable documents The Constitutional obligations of the State have been met The Defendant's Motion is denied

Dated this 2 day of June, 2005

PAT B BRIAN
Third District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing ruling to the following, this 2 day of June, 2005:

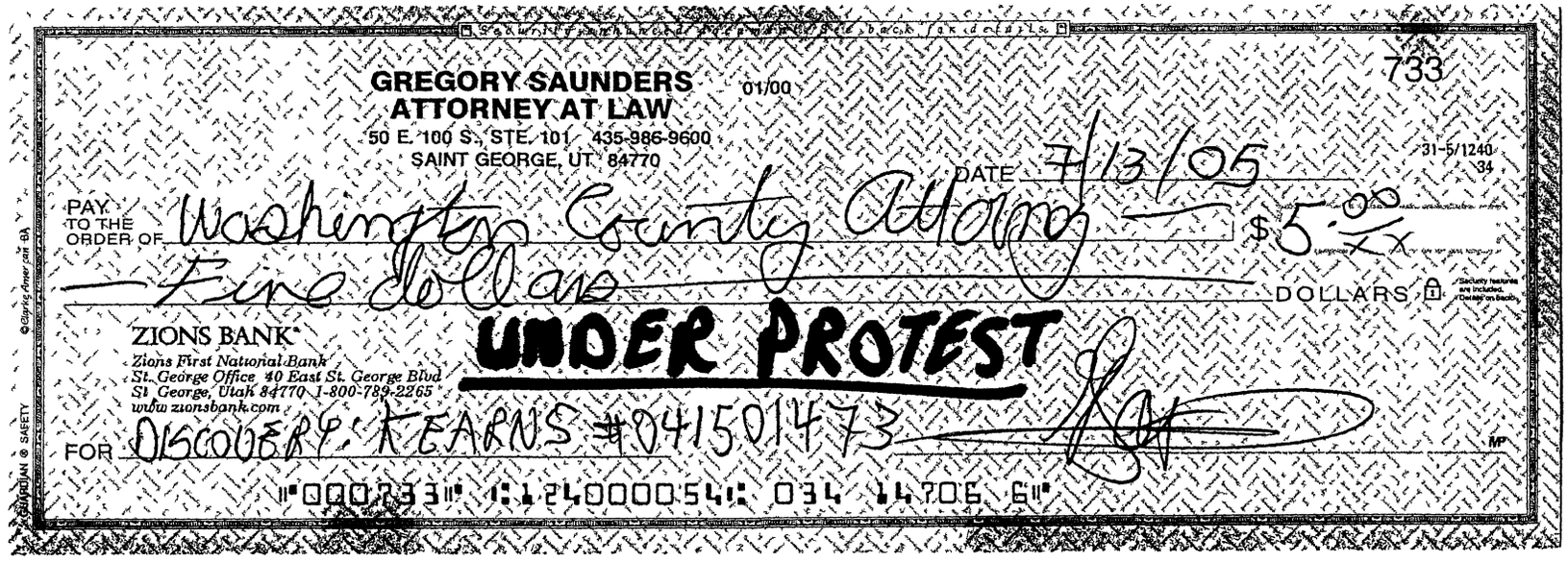
Ryan J. Shaum
Deputy County Attorney
Attorney for Plaintiff
178 North 200 East
St. George, Utah 84770

Gregory Saunders
Attorney for Defendant
50 East 100 South, Suite 101
St. George, Utah 84770

Nicole R. Call
District Court Clerk

6.

ADDENDUM D.
1 page



GREGORY SAUNDERS
ATTORNEY AT LAW
50 E. 100 S., STE. 101 435-986-9600
SAINT GEORGE, UT 84770

01/00

733

31-5/1240
34

DATE 7/13/05

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$ 5.00 XX

Five dollars DOLLARS

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St. George, Utah 84770 1-800-789-2265
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FOR DISCOVERY: KEARNS #041501473

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DISTRICT COURT
2005 SEP 12 AM 10: 09
WASHINGTON COUNTY
BY

Brock R. Belnap #6179
Washington County Attorney
Ryan J. Shaum #7622
Deputy Washington County Attorney
178 North 200 East
St. George, Utah 84770
(435) 634-5723

FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. CHRISTOPHER SEAN KEARNS, Defendant.	JUDGMENT, SENTENCE, STAY OF EXECUTION OF SENTENCE, AND ORDER OF BENCH PROBATION Criminal No. 041501473 Judge: James L. Shumate

This matter came before the Court on September 2, 2005. Matthew Miller, Deputy Washington County Attorney, appeared in behalf of the State, and the defendant was present and represented by his counsel, Gregory Saunders. The victim having left the jurisdiction of this court and the State having been unable to serve her with a subpoena to appear and testify at this hearing, COUNT 1: KIDNAPPING (DOMESTIC VIOLENCE), a second degree felony, and COUNT 2: ASSAULT (DOMESTIC VIOLENCE), a class B misdemeanor, were dismissed by the Court at the request of the State.

The defendant entered a plea of No Contest to COUNT 3: INTOXICATION, a class C misdemeanor, which plea is conditional upon defendant's right to appeal the $5.00 discovery fee

1.1

issue. Counsel for the State and the defendant made their sentencing recommendations and arguments, and the defendant was given an opportunity to make a statement in his own behalf.

The Court, being fully advised in the premises, and there being no reason why judgment should not be entered, now makes and enters the following:

JUDGMENT

IT IS HEREBY FOUND, ADJUDGED, AND DECREED that based upon defendant's plea of No Contest, which plea is conditional upon defendant's right to appeal the $5.00 discovery fee issue, the defendant, CHRISTOPHER SEAN KEARNS, shall be treated for purposes of sentencing as through he had been found guilty of INTOXICATION, a class C misdemeanor.

SENTENCE

IT IS HERBY ORDERED, ADJUDGED, AND DECREED that the defendant, CHRISTOPHER SEAN KEARNS, shall serve ninety (90) days in the Washington County Purgatory Correctional Facility as a result of his conditional plea of No Contest to INTOXICATION, a class C misdemeanor.

STAY OF EXECUTION OF SENTENCE

IT IS HEREBY ORDERED that execution of the sentence imposed herein is stayed.

ORDER OF BENCH PROBATION

IT IS HEREBY ORDERED that the defendant, CHRISTOPHER SEAN KEARNS, is placed on bench probation for a term of ninety (90) days, strictly on the following terms and conditions:

1. The defendant shall commit no law violations during the term of this probation.

2. The defendant shall not consume alcoholic beverages in excess of the amount allowed by Utah law during the term of this probation.

3. The defendant shall pay a fine in the amount of $100.00, together with interest at the statutory rate, within 30 days of the date of this judgment.

4. The defendant shall serve five (5) days in the Washington County Purgatory Correctional Facility, with credit for five days already served.

IT IS FURTHER, ORDERED, ADJUDGED, AND DECREED that this Court specifically retains jurisdiction over the above cause and over the person of CHRISTOPHER SEAN KEARNS for the purpose of making such further orders, judgments or commitments as the same may become necessary or proper.

DATED 12 Sep 05

JAMES L. SHUMATE
District Court Judge

CERTIFICATE

STATE OF UTAH)
: ss.
COUNTY OF WASHINGTON)

I, Carolyn Smitherman, Clerk of said District Court of Washington County, State of Utah, do hereby certify that the Honorable James L. Shumate, whose name is subscribed to the preceding certificate, is the Judge of said Court, duly commissioned and qualified, and that the signature of said Judge to said certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Court this 15 day of September, 2005.

CAROLYN SMITHERMAN, Clerk

By _____
Deputy Clerk

CERTIFICATE OF DELIVERY

I hereby certify that on 9-6-05 I caused a true and correct unsigned copy of the foregoing document to be delivered to the office of defendant's counsel, Gregory Saunders, by facsimile transmission to 986-0800.

Christena Wood
LEGAL ASSISTANT

STATE OF UTAH }
COUNTY OF WASHINGTON }:SS

"I certify that this document or record, is a full, true, and correct copy of the original, on file in this office."

Date: _____, 20 05

By: _____
Deputy Court Clerk

2 pages.

15A Am. Jur. 2d, Commerce §§ 7 to 21.
16A Am. Jur. 2d, Constitutional Law §§ 235, 275 et seq.
53 & 53A Am. Jur. 2d, Military and Civil Defense § 1 et seq.

Section 9. Powers Prohibited to United States

1. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

3. No Bill of Attainder or ex post facto Law shall be passed.

4. No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

5. No Tax or Duty shall be laid on Articles exported from any State.

6. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

7. No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

8. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Amendment IV. Search and seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. Grand jury indictment for capital crimes; double jeopardy; self-incrimination; due process of law; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. Jury trial for crimes and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV. Citizenship; privileges and immunities; due process; equal protection; apportionment of representation; disqualification of officers; public debt; enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a

ARTICLE I
DECLARATION OF RIGHTS

Sec. 1. [Inherent and inalienable rights]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Sec. 3. [Utah inseparable from the Union]

The State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land.

Sec. 12. [Rights of accused persons]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Sec. 14. [Unreasonable searches forbidden—Issuance of warrant]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Sec. 27. [Fundamental rights]

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

UTAH CONSTITUTION:

ARTICLE V
DISTRIBUTION OF POWERS

Section
1. [Three departments of government].

Sec. 1. [Three departments of government]

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Art. 8, § 3

Sec. 3. [Jurisdiction of Supreme Court]

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.